United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4077

To be argued
LOUIS C. PULVERMACHER

In The

United States Court of Appeals

For The Second Circuit

STOLL INDUSTRIES, INC. and MELANGE SPORTSWEAR, INC.,

Petitioners,

-against-

NATIONAL LABOR RELATIONS BOARD,

Respondent.

B
P/S

BRIEF FOR PETITIONERS

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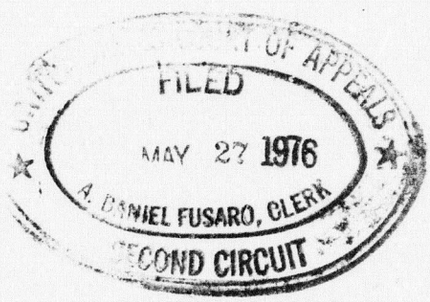

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STATEMENT OF QUESTION INVOLVED

1. Was the National Labor Relations Board's affirmance of the Administrative Law Judge's rulings, findings and conclusions that employee Nelson Arroyo's termination was a retaliatory discharge for union activity under Title 29 U.S. Code 158(a)(3) supported by substantial evidence on the record.

1a. Were the Administrative Law Judge's findings of fact supported by the testimony.

PRELIMINARY STATEMENT

Under an order consolidating the cases, STOLL INDUSTRIES, INC. ("STOLL") and MELANGE SPORTSWEAR, INC. ("MELANGE") are charged with unfair labor practices under Title 29 U.S.C. §158(a)(1) by interferring, restraining and coercing and generally interferring with employees in the exercise of the rights guaranteed by Section 7 of the Act and by discriminating in the tenure of the employment of E. ARROYO, an employee of MELANGE, in violation of Title 29 U.S.C. §158(a)(3). At the commencement of the hearing Regional Council's office pursuant to a stipulation withdrew charges under §158(a)(2).

STOLL and MELANGE concede that both were duly served by mail and are and were corporations organized under the law of the State of New York, that STOLL maintains its principal place of business at 33-35th Street, Brooklyn, New York and MELANGE maintains its principal office at 1411 Broadway, New York, N.Y. and that each business is of such a nature and magnitude as to constitute interstate commerce within the meaning of the Act.

STATEMENT OF THE CASE

MELANGE SPORTSWEAR, INC. ("MELANGE") is a vendor to retail stores of women's sweaters and contracts with other concerns for the production of the sweaters. STOLL INDUSTRIES, INC., ("STOLL") sews the garmets from knitted goods provided by MELANGE. STOLL's entire plant is in the Busch Terminal Building, Brooklyn, New York. MELANGE maintains its principal offices for sales and design in New York, N.Y. and its shipping department in a portion of the premises occupied by STOLL in Brooklyn, N.Y.

STOLL and MELANGE filed exceptions to so much of the Administrative Law Judge's decision as determines that "the discharge of employee ARROYO was in violation of §8(a)(3) and (1) of the Act" at a time when both STOLL and MELANGE had existing union agreements with Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers. During the course of the hearing a stipulation was entered into for a Board supervised election in which Local 318 and Local 155 were on the ballot.

ARROYO began working for MELANGE (he never worked for STOLL) in late September or early October of 1974, in the Packing and Shipping Department (JA 72*) at which time there were five people in the Department (JA 114), four of whom testified. ARROYO's job was to check the

*Refers to Joint Appendix

garments selected by the pickers against the order for size and style (JA 119) and to pack them. Prior to Christmas, ARROYO was reproached for errors. The entire department was also lectured and threatened with discharge for further packing errors. (JA 329, JA 146)

NORRIS ORIE, who was ARROYO's immediate supervisor, (JA 115, JA 327) spoke to ARROYO about the mistakes and testified he did not "think he (ARROYO) could have worked out ... he was packing wrong, the wrong styles, the wrong sizes. I realized that Eddie (ARROYO) was packing the boxes wrong. I took all the number 2 copies that he had packed, checked it against the orders, and I finally realized that he packed them wrong. That's the only way I could know that he was packing them wrong." (JA 329)

VARGAS, one of the employees and a friend of ARROYO, testified that he had been told there was trouble with ARROYO's work shortly before he was fired and that ORIE had said that ARROYO had made a serious error. (JA 248) Another of ARROYO's errors was discovered the day after ARROYO was fired. (JA 249) VARGAS was aware that ORIE was thinking of firing him for these errors before the actual firing. (JA 249)

Although the decision characterizes the discharge as a temporary layoff, ARROYO was rehired by another supervisor, CARMINE MINICHINO, who felt sorry for ARROYO (JA 396). MINICHINO fired ARROYO the second time because of ARROYO's inability to come to work every day. MINICHINO had rehired ARROYO to unpack returns from stores. When ARROYO was rehired, MINICHINO told him that it was important to come to work every day as he (ARROYO) would be the only person unpacking the merchandise returned from retailers. (JA 401)

The unpacking of returns was the basis of issuing a credit to the purchaser (JA 401).

On Tuesday, January 28, 1975, slightly more than two weeks after he had been rehired, ARROYO did not show up for work. He called MELANGE at 2:00 o'clock or 2:30 in the afternoon (JA 402) and said he was "stuck with his car on one of the parkways leading from the airport." ARROYO claims that he called at 11:00 or 11:30 (JA 454) in the morning.

The decision characterizes MINICHINO's testimony as "a manufactured story" and determines that ARROYO was absent on Tuesday, January 21 (not Wednesday, January 29). Neither party contended that ARROYO was absent on January 29th. STOLL contended he was absent Tuesday, January 25, 1975.

Footnote 15 of the decision proceeds on the correct assumption that union agent ALEX QUINONES had mistakingly written down that ARROYO was discharged on January 22, 1975, which notation all parties concerned conceded was erroneous, and then continues on the assumption that ARROYO went to the airport "with office manager MINICHINO's advance permission".

The general counsel's witness, MILTON HEERAPESAUD, who worked in the packing and shipping area testified that he overheard ORIE fire ARROYO. The witness explained in response to the Administrative Judge's question, "Tell us what happened at the discharge (in December)". The witness: "Well, the discharge NORRIS ORIE was telling EDDIE ARROYO that he made mistakes, a lot of mistakes and he couldn't tolerate it any more. So he fired him." (JA 391) The same witness also testified that he had heard ORIE warn the packers frequently about mistakes. (JA 392)

Notwithstanding ARROYO's statement that ORIE fired him in December and ORIE's statement that he fired ARROYO for mistakes in packing, (JA 328, 329) which errors are fully substantiated by general counsel's own witness, NICHOLAS VARGAS (JA 248) and MILTON HEERAPESAUD (JA 394),

the Administrative Judge determined "the alleged first firing at the end of December turned out to be a temporary layoff ...[and the firing] two weeks earlier for making mistakes is not credible ... The evidence shows that ARROYO did not work for almost three weeks, i.e. from December 25, 1974 to January 11, 1975 (JA 56-58).

The record does disclose that MINICHINO did not tell ORIE why MINICHINO fired ARROYO on the second occasion. (JA 354, 355, 366)

ORIE determined the mistakes ARROYO had made before the first firing (JA 328, 356), and stated without contradiction, that no one told him to fire ARROYO in December and that it was his own decision. (JA 330)

ARROYO's testimony is that he was fired on January 22, 1975, which day he fixes by reference to a diary maintained by ALEX QUINONES, (JA 179) notwithstanding the fact that the pay records indicate that ARROYO worked through and including January 28 (JA 61) and received a check dated February 7, 1975, for the two days in January. (JA 65)

In support of the NLRB's contention that ARROYO was fired for his union activities the general counsel, over the very strong objection of counsel for the Respondents, obtained an answer from ARROYO that it was ARROYO's understanding that he was fired because of his relationship

with Local 155 (JA 199) and that no other reason was ever given to him. (JA 201, 212) ARROYO further testified that preceeding his January discharge, ROSSI had seen him talking to QUINONES on the street. (JA 222)

ARROYO did not say who had fired him on January 22, 1975, although he acknowledged that ORIE fired him in December. (JA 201)

ARROYO stated that he was fired on January 22, 1975, which was a date fixed by reference to ALEX QUINONES' notebook. (JA 179) ARROYO further testified that he worked only one day in the week ending January 25, 1975 and did not work on Tuesday, January 21, 1975, notwithstanding the contradictory evidence of the time cards (see Exhibit 3 which shows he worked four days in such week and two days during the week ending February 1, 1975). The general counsel stipulated that ARROYO received a check for two days work ($39.33) for the week ending February 1, 1975.

The National Labor Relation's Board, by a three member panel, adopted the recommended Order of the Administrative Law Judge without discussion or comment (JA 22, 23) upon the exceptions raised by the Petition. (JA 70).

ARGUMENT

POINT I

The National Labor Relations Board's affirmance of the Administrative Law Judge's decision that Arroyo's termination of employment was a retaliatory discharge for union activities pursuant to §158(a)(3) of U.S.C. Title 29, was not supported by substantial evidence on the record.

EDWARD NELSON ARROYO, the only employee who had been fired prior to the hearing was fired for good and sufficient business reasons which were fully developed at the trial.

With respect to ARROYO, respondent MELANGE's uncontradicted testimony was to the effect that he was fired not once but twice for errors of work. Both firings are consistent with ARROYO's own testimony. ARROYO had testified that he was first laid off or told not to come in by NORRIS ORIE, his supervisor, in the packing department. After a hiatus of almost three weeks (JA 56-58) during which ARROYO was out of work he was told by CARMINE MINICHINO to come in for a new job, but was forewarned about lateness and regular attendance. In his testimony ARROYO first said he was out of work a few days and called in two or three days. Reference to the time

records clearly indicate that ARROYO was out of work for almost three weeks before he returned. He acknowledged that he returned to work in a different area, in a different department and that he was fired by CARMINE MINICHINO, his new supervisor. The reason for his second discharge was his failure to comply with the company rule that he notify the company if he was not coming to work; he had previously been warned about this by MINICHINO. (JA 423)

Rather than showing that his firing was due to union activities, the facts and ARROYO's testimony indicate that his union activities were minimal despite the fact he was seen talking to a union organizer two days preceeding the firing.

There were organizational efforts by Local 155 going on; MELANGE had previously entered into an agreement with Local 318. Many of the Board's witnesses were identified with Local 155, including an organizer of Local 155 who was employed by STOLL. The general counsel never contended or submitted any proof that any other person was discharged for union activity. The testimony shows that delegates from Local 155 were frequently present at or near the premises. A union organizer employed by the shop who actively assisted Local 155 as well as other

employees sympathetic to Local 155 were not fired. The finding that ARROYO's discharge was by reason of his union activities is supported solely by his testimony that he was seen talking to a union official. Unlike NLRB v. Midwest Hanger Co. & Liberty Engineering Corp., 474 E.2d 1155 (8th Cir. 1973) cert. denied 414 U.S. 823 (1973), there was only one employee discharged and such employee was not discharged once but twice. He was re-hired the second time only for humanitarian reasons. The discharge the first time was for failure to properly pack cases of material being shipped to customers of MELANGE, resulting in MELANGE's failure to fulfill its contractual obligations. These packing errors were constantly brought to the attention of ARROYO and other people in the department. ARROYO, in his statement to the Board (JA 69) acknowledged that he knew a packer had been discharged for improper packing. ARROYO acknowledged this to be a problem that he personally had experienced while employed in the packing department. ARROYO's testimony does not support any charge that his discharge was for union activities, but supports management's right to uniformly enforce a reasonable disciplinary rule. Not only did he deny the responsibility for the errors, after he had first acknowledged

such responsibility, but he set forth a confusing and unclear story concerning these errors. At no time did he claim that the original firing involved his activities with the union. If the first firing had been union connected, why would he have been rehired? As a matter of fact, he never testified to any activities in support of Local 155 other than his signing the card and that he had a conversation with one of the Local 155 delegates. There is no evidence to show that ARROYO was actually engaged in any organizational efforts. Clearly his discharge was for legitimate cause involving the improper performance of his duties.

ARROYO acknowledged that he had gone to the airport to meet a relative when he should have been at work, that his car had broken down and that he called about 11:30 A.M. The testimony of CARMINE MINICHINO places the call somewhat later but the discrepancy is unimportant.

In the case of National Labor Relations Board v. Arkansas Grain Corporation, 392 F. 2d 161 (8th Cir.1968) the National Labor Relations Board brought a proceeding against a soy bean, oil and meal processor for the enforcement of its order based on charges that the processor-seller had coercively interrogated its employees about union activities and had discriminatorily discharged an

employee because of his activities in support of the union. The Court of Appeals held that the evidence failed to establish that the employer had coercively interrogated the employee about union activities or that employee participation in the union election had been restricted or limited in any way. The NLRB failed to sustain the burden of proof that the employer had violated the National Labor Relations Act by discriminatorily discharging an employee because of his union activities. The court in reversing the decision of the Board stated:

> "The respondent had a right to discharge Meek for inefficiency and failure to perform his duties so long as the discharge was not motivated in whole or in part because of union activities". (392 F.2d 161 at 167)

The court further stated: (392 F. 2d 161 at 166)

> "With reference to 8(a)(3) and (1) violations. On the next day following the election, April 23, 1965, Employee Meek reported to work at 3 pm. He and Foreman Ragsdale outlined the duties he expected from Mr. Meek. They were instructions of Meek's duties which he had not at all times observed in the past. This dereliction of duties is borne out by the testimony that on two previous occasions management officials took preliminary steps to discharge Meek for his actions but refrained upon Meek's promise to do better. As pointed out by the Board, Meek's past record as an employee had been less than satisfactory."

In the case of National Labor Relations Board v. Lowell Sun Publishing Company, 320 F. 2d 835 (1st Cir. 1963) the Court held inter alia that the evidence established that an employee absenting himself from his job on two successive Saturdays and not his union activities was the impelling motive for his discharge. The evidence failed to sustain the Board's conclusion that the employee's dereliction of duty on two successive Saturdays was not serious.

The court in denying enforcement of the Board's decision with respect to said employee stated (320 F. 2d 835, at 841):

> "However, we are unable to agree with the Board that employee Breen was discriminatorily discharged. The record is clear that Breen was twice, on successive Saturdays, assigned by respondent to a position of responsibility-whatever its precise level-and that Breen was fully aware of this fact. The record is equally clear that without seeking or receiving permission from his supervisors, he absented himself from his job on two separate occasions. Thereafter, in discharging Breen, the respondent made it clear to him that he was being separated for dereliction of duty. There can be no question that-union status apart-the respondent possessed the right to discharge employees for cause, and nothing in the Act suspends this right. A thorough examination of this record leaves us with the compelling conclusion that the defection of Breen on the two successive Saturdays was the impelling motive for his discharge and not his Union activities. The mere fact that he was a Union adherent does not immunize conduct, which would otherwise be grounds for discharge."

In the case of National Labor Relations Board v. Stover, 114 F.2d 513 (10th Cir. 1940), the National Labor Relations Board petitioned for enforcement of its order; an amended charge was filed against Stover charging that Stover had violated the National Labor Relations Act 29 U.S.C. §151 et seq. by discharging certain employees because they had engaged in union activities.

The court stated: 114 F.2d 513 at 516 -

> "The inefficiency of Ralph and Elmer Barlow was established by the testimony of their fellow employees and is uncontradicted. While they received increases in compensation it is clear that it was due to Stover's sympathy and not because their work justified the increases. We are convinced that the evidence overwhelmingly established that Ralph and Elmer Barlow were discharged because of their inefficiency and the decline in business, and that Thomas was discharged because of the decline in business and in order to restore the place of the old night watchman who was no longer needed on day duty, that these were the sole reasons for the discharges and that the evidence admits of no reasonable inference to the contrary."

In the case of Martel Mills Corporation v. National Labor Relations Board, 114 F.2d 624, (4th Cir. 1940) Martel Mills Corporation petitioned the court to review and set aside an order issued by the National Labor Relations Board against the Petitioner. The court reversed the decision of the Board based on its finding that the evidence against the employer as found by the

Board was insubstantial and did not support the Board's determination that the employees were dismissed without cause for their union activities.

The court stated: 114 F.2d 624 at 632 -

> "It [Martel Mills] offered undisputed evidence that Buster Whittle ... often left his work causing economic losses to the pieceworkers, came to work ahead of time in violation of state regulations, had been given many warnings about his general behavior."

Furthermore, the court found that Mr. Whittle's union activities were de minimus, and remarked -

> "It seems strange that the Martel Mills should have selected Whittle ... out of all other union members as the object of their discrimination." 114 F.2d 624 at 632

The court held, and appellant believes, that the NLRA was not intended to deprive an employer of the managerial decisions of choosing his employees based on their abilities, but was only intended to protect employees against discrimination caused by union affiliations.

As the court aptly stated: -

> "Under a system of free enterprise .... [t]he employer must be permitted to discharge the inefficient, the irresponsible, the disobedient, the immoral."

In the case at bar, the dismissal of ARROYO is supported by overwhelming and admitted evidence that he was inefficient, irresponsible and disobedient. The

testimony also shows that there were other employees far more involved in Local 155 activities than ARROYO who were not discharged.

In the case of Steves Sash & Door Company v. National Labor Relations Board, 401 F. 2d 676 (5th Cir. 1968) an employer petitioned the court to review and set aside an order issued by the Board which found the employer's discharge of two employees and laying off a third employee unlawful. The Court of Appeals held that the evidence did not support the Board's determination that the employee was wrongfully discharged. The testimony of the foreman and the superintendent of maintenance was that the employee was inefficient and talked too much to other employees.

The court stated: 401 E.2d 676 at 681-68 -

> "Putting Perez' testimony to one side there remains the undisputed and independent testimony of Elton Varga that Gonzalez was fired because he loafed and talked too much to other employees. Considering this testimony and discounting the conversation between Perez and Gonzales the case resolves itself to one involving an inefficient employee who happens to be a Union adherent. The mere fact that an inefficient employee is also a union sympathizer is no basis for finding a discriminatory discharge. NLRB v. Soft Water Laundry, Inc., 5th Cir. 1965, 346 F. 2d 930, 934. As we are unable to conclude from our reading of the record that the Board's decision is supported by substantial evidence, enforcement of that part of the order requiring Gonzales reinstatement with back back is denied."

The Board's determination that ARROYO was fired

for union activities as opposed to poor performance of his duties is not supported by the evidence presented.

1a. THE ADMINISTRATIVE LAW JUDGE ERRED IN THE FINDINGS OF FACT ON WHICH HE BASED HIS DECISION.

The decision of Administrative Law Judge Herzel H. E. Plaine, (JA 3 thru 21) as relates to the issue under review are:

1. The absence occurred on Tuesday, January 21st (JA 14, Footnote 15, Line 52-53).

2. "The alleged first firing at the end of December turned out to be a temporary layoff." (JA 15, Line 26)

3. "Orie's and Minichino's contention that Orie had fired Arroyo two weeks earlier for making mistakes is not credible ..." (JA 15, Line 33-34).

4. "On recall, Arroyo was given a special job for the first several days." (JA 15, Line 37)

5. "On the evening of the day Arroyo was fired, said Orie, Minichino told him he had fired Arroyo for making a mistake..." (JA 16, Lines 8,9,10)

6. The absence of ARROYO to go to the airport was on Tuesday, January 21st and was allowed and occurred a week before the discharge. (JA 16, Lines 35 through 38)

7. ARROYO was informed by his immediate supervisor, Traffic Manager ORIE, on January 29, 1975, that he had been fired by the boss. (JA 17, lines 27 through 29).

8. "Minichino's advance permission was obtained" for the absence. (JA 18, Line 12-13)

The foregoing "findings of fact" are without support of any testimony in the record. The Administrative Law Judge indulges in speculation and convoluted reasoning. His footnote "15" (JA 14) arrives at a finding that the unexplained and unauthorized absence of ARROYO complained of by MELANGE occurred on January 21, 1975, despite the overwhelming testimony which clearly showed ARROYO's absence to go to the airport occurred on Wednesday, January 29th. It is MELANGE's position that the firing based on ARROYO's failure to come to work is a valid business reason. By adopting this unsupported approach the Administrative Law Judge "excuses" the absence and never deals with the reality that ARROYO's own testimony clearly and unequivocally showed he went to the airport on a weekday following his last full day of work, January 29

The decision then links ARROYO's conversation with a union delegate of Local 155 which apparently occurred on Monday, January 20, 1975 to his dismissal on January 29. At the time of this conversation MELANGE had an existing contract with Local 315.

The Administrative Law Judge finds as a fact (JA 15, lines 34 and 35) that ORIE, ARROYO's former supervisor,

approved a January pay raise after ARROYO was rehired notwithstanding MINICHINO's testimony that the increase was given to ARROYO because the job was different. MINICHINO denied ever discussing the raise with ORIE. MINICHINO felt sorry about ARROYO's prior discharge and did not discuss with ORIE, ARROYO's former supervisor, the second hiring. By adopting this unsupported approach, the Administrative Law Judge makes one absence out of the two unexplained absences and switches the significant day of the absence, notwithstanding the lack of evidence in support thereof.

In fact the Administrative Law Judge acknowledged that the testimony of the employee based upon a written memorandum of a union agent, QUINONES was a mistake when written as January 22nd. (JA 14, Lines 30 through 34) ARROYO had no independent recollection and relied on the erroneous QUINONES' note.

The Administrative Law Judge finds the absence on January 21st "had been allowed and was acceptable to MINICHINO' (JA 16, Lines 18-19) but this too is erroneous as there is no testimony to support the finding. The Administrative Law Judge also characterizes MELANGE's contention concerning ARROYO's unexcused absence as being "dredged up as an alleged cause for discharge only after the necessity to find a cause arose later." (JA 16, Lines 39 through 41).

The record clearly demonstrates substantial organizational efforts by Local 155 at this time and that MELANGE had an existing contract with Local 318. The testimony of RAMONITA GUZMAN, although not reproduced in the Joint Appendix, is reproduced in the full record and acknowledges that she was an employee of STOLL and was an organizer for Local 155. She testified that she had been called into the office and asked why she had not signed a Local 318 card and was advised of the contract with 318 and its requirements. As to this the Administrative Law Judge correctly found that the President of STOLL "did not contradict her testimony". (JA 7, Line 34-35). None of the employees who testified in support of the complaint were discharged. Nor was there testimony that any other employee had been discharged for union activity. The only employee discharged was the packer, ARROYO, who had been discharged, first for mistakes and then rehired by another supervisor and then discharged for two absences.

CONCLUSION

THE AFFIRMANCE BY THE NLRB OF THE TRIAL EXAMINER'S DECISION IS NOT SUPPORTED BY A SUBSTANTIAL PART OF THE EVIDENCE. UNDER THE APPROACH TAKEN BY THE ADMINISTRATIVE LAW JUDGE NO EMPLOYEE CAN BE DISCHARGED FOR MISCONDUCT REGARDLESS OF THE BUSINESS REASONS INVOLVED. SUCH CONTENTION IS QUITE OBVIOUSLY NOT THE LAW. IT IS RESPECTFULLY SUBMITTED THAT THE AFFIRMANCE OF THE BOARD SHOULD BE REVERSED AND THAT ENFORCEMENT OF THAT PART OF THE ORDER REQUIRING ARROYO'S REINSTATEMENT WITH BACK PAY BE DENIED.

Respectfully submitted,

LOUIS C. PULVERMACHER
Attorney for Petitioners

Raymond Messina
Of Counsel

A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
FOR THE SECOND D CIRCUIT

STOLL INDUSTRIES INC AND MELANGE SPORTWEAR INC.,
Petitioners,

- against -

NATIONAL LABOR RELATIONS BROAD,
Respondent.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF **NEW YORK** *ss.:*

I, Velma N. Howe *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 298 Macon Street, Brooklyn, New York 11216

That on the **27th** *day of* **May** *19* **76** *deponent served the annexed* **Appendix** **Brief** *upon* **General Counsel Nat'l labor Rel. Bmnk Brcld** *Attorney(s) for* **Respondent** *in this action, at* **1717 Pennsylvania Avenue, N.W. Washington, D.C. 20570**, *the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this **27th** *day of* **May** *19* **76**

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Velma N. Howe

VELMA N. HOWE